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IN THE

Supreme Court of the United States

October Term, 1968

No. 519

MARVIN HAYUTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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This Court Should Review the Creation by the Courts Below of a New Doctrine to Justify Depriving Petitioner of the Opportunity to Prove His Defense.

We deem it necessary to reply only to the Government's argument regarding the exclusion of Petitioner's offers to prove that two of the four principal witnesses against him had expressly admitted an intention wrongfully to inculpate Petitioner (Gov't. Br., pp. 7-8; see Petition, pp. 16-21).

That the evidence was offered, not as impeachment but to prove the defense—a conspiracy to "frame" Petitioner—

was clearly and unmistakably argued to both the District Court (F4, F5) and the Court of Appeals. Indeed, the Court of Appeals recognized, albeit only momentarily, that the proferred testimony was "relevant and probative of the defense" (A16).

The difficulty that Petitioner has faced, however, has been that the Courts below have seemed to hear and acknowledge the argument, and then to pretend it was never made. Thus, after an extended bench conference during trial, at which it was repeatedly explained that the Cumberland testimony was being offered to show the "state of mind" of prosecution witness Gafni (F4, F5), the District Court rejected the offer because no foundation for impeachment had been laid (F5, F6). And the Court of Appeals, after expressly acknowledging the relevance of the offers to prove "the defense," inexplicably held that they were "properly excludable" because they were prior inconsistent statements offered "to discredit a witness" and no foundation had been laid (A17).

Similarly, at no point in this case has the Government come to grips with Petitioner's point. Its brief in opposition to this Petition simply says that "counsel did not lay a foundation for such proof in cross-examination of the witnesses" (p. 7).

No attempt is now (or has ever been) made to square the lower courts' decisions with the principle of "multiple admissibility" or with any of the cases cited in the Petition (pp. 16-21). Instead of reasoned elaboration of the law, Petitioner has been met with a wall of silence from the moment this issue was raised at the trial to the present. The insistence by the Courts below upon ignoring the law while pretending to adhere to it, and upon creating the new rule that evidence inadmissible for one purpose is

inadmissible for all purposes, is not only erroneous and unfair; unless corrected by this Court, it will have prevented Petitioner from proving his defense.

Respectfully submitted,

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